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MAYBAN FINANCE BHD

v.

YAU JIOK HUA & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL NO: D4-23-1604-1988]
22 JANUARY 2007

C ***CONTRACT:*** *Guarantee - Guarantor - Default of loan - Whether action against defendants premature - Letters notifying variation of interest rates - Failure to indicate mode of notification - Non production of evidence that borrower received said letters - Whether fatal in respect of claim for increased interest rate - Whether plaintiff's claim as to*
D *calculation of interest incorrect - Whether plaintiff's claim in relation to interest dismissed - Whether judgment entered for the plaintiff*

The plaintiff gave a loan of RM300,000 at the interest rate of 13% per annum to a company known as Ganda Modal Sdn Bhd
E (the said borrower). The terms of the loan was described in a document of charge dated 18 July 1980. The defendants were the guarantors for the said loan under an on demand guarantee. The plaintiff alleged that it had varied the rates of interest three times. The plaintiff further alleged that the said borrower made a default
F in the repayment of the loan some time in 1981. Pursuant to the said default, the plaintiff had commenced this action against the defendants pursuant to a letter of demand dated 31 May 1988 since the liability of the defendants arose upon a written demand being made. The issues raised by the defendants were: (1) that the
G plaintiff's cause of action to recover the whole amount outstanding was premature; (2) that the amount demanded of them included the sum charged on varied interest that the plaintiff was not entitled to impose; (3) that the calculation of interest of 360 days was not in compliance with the terms of the charge documents, therefore, the sum claimed and the accounts produced by the
H plaintiff had a manifest error.

Held:

(1) As guarantor, the defendant's liability is contingent upon the
I primary obligation, being principal debtor's liability and ultimately his default. Thus if the principal debtor is excused or his liability terminated, the guarantor is generally discharged

from his secondary obligation. As the principal debtor, however, the liability was direct or primary and not secondary. In this case, the defendants have signed not only as guarantor but also as principal debtor. There was, therefore, no impediment against suing the defendants before the plaintiff realised upon the security. The letter of demand dated 31 May 1988 demanding the sum of RM1,007,051.59 was therefore not defective and void. Neither was the action against the defendants premature. (para 7)

(2) An examination of the copies of the three letters notifying the variation of the interest rates failed to indicate the mode it was sent. The plaintiff could not produce any evidence to show that those letters were sent by pre-paid registered post or otherwise. The plaintiff could not produce any evidence that the borrower had received the said letters. This was fatal in respect of the claim for the increased interest rate. The agreement was specific that notice is to be given in accordance with the National Land Code which required specifically personal service or by pre-paid registered post. Indeed not being able to show when the notice was served, cl. 5(a) of the charge could not be complied with to allow the variation of interests. (paras 9 & 10)

(3) The plaintiff admitted in its revised witness statement that there was an over-estimation of RM900 from the time the calculation was based on 360 days until such practice ceased after one year five months. Now this sum of RM900 had been included with the principal sum and compounded. The total sum as claimed could not be corrected by a simple exercise of merely deducting the sum of RM900 from the total sum claimed. At case management the court had directed the plaintiff to produce a fresh statement of accounts to regularize its calculation on 365 days basis but the plaintiff had not done so. The sum in the plaintiff's claim as to interest calculation herein being incorrect, and the plaintiff having failed to correct the amount claimed upon being given the opportunity and directed in case management to do so, the court ordered that that part of the plaintiff's claim relating to interest be dismissed. Judgment was therefore entered for the plaintiff in respect of the principal amount. (para 12)

[Order accordingly.]

Legislation referred to:
National Land Code, s. 431

For the plaintiff - Mahendra Mahason (Rajan Ayappan & Selvan Samuel with him); M/s M Pathmanathan & Co
For the defendants - P Yugan (Eric Clement with him); M/s Siva, Thurai, Mariany & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] The plaintiff gave a loan of RM300,000 at the interest rate of 13% per annum to a company known as Ganda Modal Sdn Bhd (hereinafter referred to as the said borrower). The terms of the loan were described in a document of charge dated 18 July 1980. The defendants were the guarantors for the said loan under an on demand guarantee.

[2] The plaintiff alleged that it has varied the rates of interest three times as follows:

(i) From 15 November 1980, interest increased from 13% to 14%;

(ii) From 1 June 1981, interest increased from 14% to 15%; and

(iii) From 15 August 1981, interest increased from 15% to 17%.

[3] The plaintiff alleged that the said borrower made a default in the repayment of the loan some time in 1981. Pursuant to the said default, the plaintiff issued two letters of demand dated 23 May 1984 and 31 May 1988. The plaintiff had commenced this action against the defendants pursuant to a letter of demand dated 31 May 1988 since the liability of the defendants arise upon a written demand being made. No evidence of the mode of notification of the letters notifying the varying of the interest rates were produced by the plaintiff. No evidence that the said letter of variations were received by the company was produced by the plaintiff.

[4] The plaintiff admitted that the calculation of interest was made on the basis of 360 days and not 365 days for the period of one year and five months upon the facilities drawdown in September 1980.

[5] The issues raised by the defendants are as follows:

(i) That the plaintiff's cause of action to recover the whole amount outstanding is premature.

(ii) That the amount demanded of them includes the sum charged on varied interest that the plaintiff is not entitled to impose.

(iii) That the calculation of interest of 360 days is not in compliance with the terms of the charge documents, therefore, the sum claimed and the accounts produced by the plaintiff has a manifest error.

That The Plaintiff's Cause Of Action To Recover The Whole Amount Outstanding Is Premature

[6] At the time the letter of demand was sent to the defendants ie, 31 May 1988 upon which this suit was commenced, the plaintiff had yet to sell the security held. The property was only sold on 7 June 1990. It was argued that the plaintiff's failure to sell the security before commencing this action for the balance has rendered this suit against the defendants both premature and defective.

[7] As guarantor, the defendants' liability is contingent upon the primary obligation, being principal debtor's liability and ultimately, his default Thus, if the principal debtor is excused or his liability terminates, the guarantor is generally discharged from his secondary obligation. As the principal debtor however, the liability is direct or primary, and not secondary. In this case, the defendants have signed not only as guarantor but also as principal debtor. There is, therefore, no impediment against suing the defendants before the plaintiff realised upon the security. The letter of demand dated 31 May 1988 demanding the sum of RM1,007,051.59 is, therefore, not defective and void. Neither is the action against the defendants premature.

A **That The Amount Demanded Of Them Includes The Sum Charged On Varied Interest That The Plaintiff Is Not Entitled To Impose**

[8] Clause 5 of the charge provides:

B

> The principal sum hereby secured is lent or advanced upon the condition that (subject as in this clause mentioned) the Chargee may from time to time at its absolute discretion by notice in writing of its intention so to do increase or reduce the ruling rate of interest payable hereunder and in regard thereto the following
C provisions shall apply and have effect: ...

The charge thus stipulates that any variation of interest rates must be done by issuing a notice in writing. Clause 24 of the charge provides for the mode any notice in writing under the charge was
D to be issued. It reads:

> Any notice required or authorized by this charge or by statute to be given to or served on the chargor shall be in writing and shall be sufficiently served on the chargor if served in any manner in which a notice may be served under the National Land Code.

E

Section 431 of the National Land Code provides that any notice given under the statute could amongst others be served by personal service or if by post, by pre-paid registered post.

[9] An examination of the copies of the said 3 letters, of 10
F October 1980, 22 April 1981 and 14 July 1981, notifying the variation of the interest rates failed to indicate the mode it was sent. The plaintiff could not produce any evidence to show that those letters were sent by pre-paid registered post or otherwise. The plaintiff could not produce any evidence that the borrower
G had received the said letters. This is fatal in respect of the claim for the increased interest rate, particularly since cl. 5(a) of the charge provides:

> Any increase or decrease in the ruling rate shall take effect from
H the end of one month after the date on which such notice is served on the Chargor and the increased or reduced interest shall be calculated as herein before provided.

The fact the defendant made payment on 6 December 1980 does not prove the notice of 10 October 1980 had been sent to him
I as required by the charge, since he was obliged in any event to make payments.

[10] It was submitted for the defendant:

> Pursuant to a foreclosure action *vide* Kuala Lumpur High Court Originating Summons No: F675 of 1981, the Court made an Order For Sale of the charged property. On 07.06.1990 the charged property was auctioned off for RM495,000.00 at the time when the ruling rate of interest was at 17% per annum. Neither the Chargor nor the Defendants had challenged the validity of the said Order For Sale made by the Court.

The order of the court is not in evidence before the court. The submission is, therefore, not supported by evidence before this court. The agreement is specific that notice is to be given in accordance with the National Land Code which required specifically personal service or by pre-paid registered post. Indeed not being able to show when the notice was served, cl. 5(a) of the charge could not be complied with to allow the variation of interests.

That The Calculation Of Interest Of 360 Days Is Not In Compliance With The Terms Of The Charge Documents, And Therefore The Sum Claimed And The Accounts Produced By The Plaintiff Contains A Manifest Error

[11] The plaintiff has admitted it had calculated the interest on per annum based on 360 days and not 365 days. The plaintiff admitted that the calculation on 360 days was not in compliance with the agreement. It was argued for the plaintiff that it was right in doing so as it was "banking practice" at that point in time.

[12] The plaintiff admitted in its revised witness statement that there is an over-estimation of RM900 from the time the calculation was based on 360 days until such practice ceased after 1 year 5 months. Now, this sum of RM900 had been included with the principal sum and compounded. The total sum as claimed cannot be corrected by a simple exercise of merely deducting the sum of RM900 from the total sum claimed. At case management, the court had directed the plaintiff to produce a fresh statement of accounts to regularize its calculation on 365 days basis but the plaintiff had not done so. It had decided to rely on the statement of accounts produced in the bundle of documents. The offer to recalculate was then made in submissions.

[13] The sum in the plaintiff's claim as to interest calculation herein being incorrect, and the plaintiff having failed to correct the amount claimed upon being given the opportunity and directed in case management to do so, the court ordered that that part of the plaintiff's claim relating to interest be dismissed. Judgment was, therefore, entered for the plaintiff in respect of the principal amount, with no order as to costs.